United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1218

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1218, 1265, 1266, 1354, 1438

IN THE MATTER OF THE COMPLAINT

of

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability.

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS,

Appellant.

69 Civ. 5303

BINGHAM & COMPANY, et al.,

Plaintiffs-Appellants,

against

THOS. & JNO. BROCKLEBANK, LTD.,

Defendant-Appellee.

70 Civ. 290

KELLER INDUSTRIES INC.,

Plaintiff-Appellant,

against

THOS. & JNO. BROCKLEBANK LTD., et al.,

Defendants-Appellees.

69 Civ. 4644

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS BINGHAM & COMPANY, ET AL.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes: PAGE

Other Authorities:

BRIEF OF PLAINTIFFS-APPELLANTS BINGHAM & COMPANY, ET AL.

Preliminary Statement

This is an appeal from the decision of the Honorable Marvin E. Frankel, D.J., dated November 16, 1973 and amended on November 21, 1973 and December 4, 1973.

Statement of Issues Presented for Review

1. The District Court erred as a matter of law in holding that Compania Naviera Epsilon, S.A. made "substantial efforts" to find a licensed officer to replace the temporarily employed boatswain who was acting in the capacity of a licensed officer for more than a year prior to the stranding and who had the watch when the vessel went aground.

2. Compania Naviera Epsilon, S.A. is at fault for failing to man the M/S "Nicolaos S. Embiricos" in accordance with the laws and regulations of the Kingdom of Greece and because of its failure in this regard has the burden of proving that its fault not only did not but could not have been a contributing cause of the resulting stranding and damage.

3. Compania Naviera Epsilon, S.A., as owner of the M/S "Nicolaos S. Embiricos", is at fault for manning its vessel not only with unlicensed but with incompetent personnel.

4. The District Court applied improper legal standards in concluding that the master of the M/S "Nicolaos S. Embiricos" was competent.

5. Compania Naviera Epsilon, S.A. is at fault for failing to provide its vessel with the latest governmental navi-

gational publications which contained pertinent information relative to the safe passage of a ship through One and One Half Degree Channel.

6. The District Court erred in exonerating Compania Naviera Epsilon, S.A. after specifically holding that a "basic error" which caused and contributed to the stranding of the "Nicolaos S. Embiricos" was the improper selection of the route which the vessel would follow to her destination.

7. The voyage was frustrated as a result of the ship owner's failure to exercise due diligence to furnish cargo interests with a seaworthy vessel, therefore, Thos. & Jno. Brocklebank Ltd. are not entitled to recover freight monies.

Statement of the Case

On May 15, 1969 the Greek flag ship "Nicolaos S. Embiricos" grounded on Suvadiva Atoll, Maldivian Islands, in the Indian Ocean while en route from Indian, Pakistanian and Ceylonese ports to ports located on the Gulf and Atlantic Coasts of the United States. The vessel became a constructive total loss and the cargo sustained damage in the approximate amount of $2,500,000.

Compania Naviera Epsilon, S.A., as owner of the "Nicolaos S. Embiricos", filed a complaint for limitation of or exoneration from liability. The owners and underwriters of the cargoes laden on board the vessel at the time of the stranding filed claims and an answer in that proceeding. Cargo interests also brought suit against Thos. & Jno. Brocklebank Ltd. who, as time charterer of the vessel, had issued bills of lading to the shippers of the cargo for the master. Thos. & Jno. Brocklebank Ltd. filed a contingent claim and an answer in the limitation proceeding instituted by Compania Naviera Epsilon, S.A., and also filed a counterclaim against some of the cargo

claimants who had not paid freight. All of the cases were consolidated for trial and for appeal.

The District Court found that the acting second officer who was in charge of the watch when the vessel stranded was an unlicensed boatswain who had been temporarily employed to act in the capacity of a licensed second mate by the ship owner approximately thirteen months before the stranding. The uncontradicted testimony elicited from the ship owner's expert witness proved that the unlicensed boatswain was not capable of acting in the capacity of a licensed second mate. One of the issues raised by cargo claimants was whether or not the boatswain was competent. The District Court refused to meet this issue. Instead, the Court held that it was immaterial whether the boatswain was licensed or unlicensed, competent or incompetent.

The uncontradicted evidence, again elicited from the ship owner's expert witness, established that the captain of the "Nicolaos S. Embiricos" was incapable of solving basic navigational problems, i.e. he was unable to determine the actual course and speed of a vessel which was proceeding in an ocean current; he could not correctly interpret an ocean current chart. The master of the "Nicolaos S. Embiricos" had stranded the vessel on two prior occasions. The District Court found that the captain was guilty of "grave" errors. Nevertheless the District Court, laboring under the impression that the ship owner's expert witness had testified on behalf of cargo claimants, saw fit to rely upon its own expertise and without referring to any recognized standards of conduct held that the master was a competent officer.

The District Court found that the ship's radar was not in use when the vessel stranded; that the failure to use the ship's radar was a proximate cause of the stranding; that the ship's master did not know that the Maldivian Atolls provided good radar targets; and that the naviga-

tional publication which contained the information that the atolls of the Maldivian Islands could be detected by radar at a distance of twenty miles was not aboard the ship. The District Court held that it was no "more than remote speculation" to conclude that the ship's master would have relied upon the radar information contained in the recent navigational publication had it been available.

The District Court exonerated Compania Naviera Epsilon, S.A., as owner of the vessel, and Thos. & Jno. Brocklebank, as charterer, and further held that Thos. & Jno. Brocklebank was entitled to recover from cargo interests the freight monies which were withheld. Cargo claimants appeal.

Statement of Facts

Compania Naviera Epsilon S.A. is a corporation organized and existing under and by virtue of the laws of the Republic of Panama. It purchased the M/S "Nicolaos S. Embiricos" while the vessel was being constructed in 1958, and continued to own the vessel from its launching until it stranded on May 15, 1969.

Thos. & Jno. Brocklebank, Ltd. is a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and was on May 15, 1969 the time charterer of the M/S "Nicolaos S. Embiricos". Thos. & Jno. Brocklebank issued bills of lading for the master to the shippers of the cargoes laden on board the "Nicolaos S. Embiricos". The bills of lading contain, among other provisions, an earned freight clause which reads as follows:

> "Full freight is due on damaged or unsound goods and on packages barrels or containers received part full or empty. Freight on the goods shall be deemed earned on shipment, and shall be payable vessel and or goods lost or not lost."

Cargo claimants, Bingham & Company, et al., are corporations or business organizations who were the owners of the cargoes laden on board the "Nicolaos S. Embiricos" on May 15, 1969, or are the underwriters of such cargoes who, by reason of the payments made to their assureds pursuant to the terms and conditions of the policies which they issued, have been subrogated to the rights of such owners.

The M/S "Nicolaos S. Embiricos" was a dry cargo motor vessel, 469′7″ in length, 61′9″ in breadth, of 8,460 gross and 4,964 net tons. On May 15, 1969 the M/S "Nicolaos S. Embiricos" was registered under and pursuant to the laws of the Kingdom of Greece.

In late April and early May of 1969 cargoes of jute, burlap, hessian cloth and tea, in apparent good order and condition, were laden on board the "Nicolaos S. Embiricos" at the ports of Calcutta, Chittagong, Chalna and Colombo. The cargoes were to be delivered to various consignees at ports located on the Gulf and Atlantic Coasts of the United States via the port of Durban, South Africa. As a result of the stranding some of the cargo was lost, some of the cargo was damaged, and that remaining sound was subject to claims for salvage.

Pursuant to Greek law, a vessel of the dimensions of the "Nicolaos S. Embiricos" must be manned by a deck officer complement consisting of a licensed master, a licensed chief officer and two licensed second mates* (176a): with the proviso that unlicensed seamen may be temporarily employed to act in the capacity of a licensed officer "in instances where it is manifestly difficult" to find licensed officers or where the available licensed officer is demanding a wage which is higher than that set by the Greek Government (Ex. 9, 307a-308a).

At the commencement of the voyage which ended when the "Nicolaos S. Embiricos" stranded on Suvadiva Atoll,

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* The Greek Government does not issue third mate certificates.

Maldive Islands, on May 15, 1969, the deck officer complement of that vessel consisted of a licensed master, a licensed chief officer, one licensed second mate and a boatswain acting as a licensed mate.

The boatswain, Paraskevas Alexapoulos, was hired in March 1968 (262a, 263a) and signed on board the "Nicolaos S. Embiricos" at the port of Ravenna in April 1968. Consequently, at the commencement of the voyage he had been *temporarily* acting in the capacity of a licensed mate for more than one year.

The Maritime Employment Agency, a branch of the government of the Kingdom of Greece, attested that there were licensed mates available at the then prevailing wage schedule at least through the period of from January 1, 1969 through May of 1969 (Ex. Q, 326a). This testimony was uncontradicted. There was further affirmative evidence from the Maritime Employment Agency, again uncontradicted, that Compania Navicra Epsilon, S.A. never applied to the agency for a licensed mate to replace the boatswain during the foregoing period (Ex. Q, 326a).

Prior to the inception of the voyage and at all pertinent times thereafter the vessel had on board the following nautical publications which contain information relevant to navigating a vessel in the Indian Ocean between Ceylon and the Maldivian Islands:

(1) British Admiralty Chart 2898, Ceylon to Maldive Islands, issued in 1958. Last corrected through Notices to Mariners issued in 1958.

(2) British Admiralty Chart 66A, B & C, Maldivian Islands, issued in 1958. Last corrected through Notices to Mariners issued in 1958.

(3) Indian Ocean Current Charts prepared by the British Meteorological Office, issued in 1939, which contained information relative to currents compiled from observations made for the years 1910 to 1934.

(4) West Coast of India Pilot, published by the British Hydrographic Office, 9th Edition, in 1950, with a supplement #4 which was issued in 1957.

(5) Lights and Tides of the World, Part I, published in 1967, and Part II, published in 1964.

(6) Ocean Passages of the World, published in 1960.

All, with the exception of #5 and #6, were published prior to the time the "Nicolaos S. Embiricos" was launched. The West Coast of India Pilot, item #4, was outdated and out of publication long prior to the time the "Nicolaos S. Embiricos" departed on her voyage. Neither the 1950 Edition of the West Coast of India Pilot, nor the supplement which was issued in 1957, contained any information respecting radar navigation in the vicinity of the Maldivian Islands. The 10th Edition of the West Coast of India Pilot, published in 1961, eight years before the stranding, which was not aboard the vessel, contains the following comment:

> "Radar Information. In 1960 'HMS Scarborough' reported that the Coral Islands on the [Maldivian] Atolls could be detected by radar at a range of just over 20 miles, and the arrangement of the individual islands could be obtained at 15 miles. The breakers on the edges of the reefs were detected at about 2 miles."

At the commencement of the voyage which ended in the stranding, the "Nicolaos S. Embiricos" was equipped with a Sperry Mark 14E model 30 gyro compass, which was apparently operating properly; a Sperry Mark 14E course recorder which was in good order; a Sperry Mark EV Model O automatic pilot, which was in good condition; a Marconi seagraph type 840, and a Marconi seawise type 841A echo sounder which were in good condition; a Marconi type 758E radio direction finder which had last been calibrated on May 19, 1958, eleven years prior to the stranding; magnetic compasses which were last calibrated in

1958, and a Marconi radar which the District Court found to be in good operating condition.

On the morning of May 13, 1969 the M/S "Nicolaos S. Embiricos" departed the port of Colombo, Ceylon, en route to Durban, South Africa and thence to the United States. Her course, which was selected before the vessel commenced her voyage (172a, 173a), would take the vessel through the Maldive Islands via One and One Half Degree Channel.

The owners and operators of vessels proceeding from Colombo to Durban may select a route which takes their ships through One and One Half Degree Channel (a narrow 54 mile wide passage between Suvadiva and Haddummati Atolls of the Maldivian Islands) or a route which takes vessels south of the Maldivian chain. The routes are about equal distance in mileage. The monsoon season in the Indian Ocean commences during the month of May and the prevailing winds create easterly setting ocean currents between Ceylon and One and One Half Degree Channel which makes it hazardous in May to choose the One and One Half Degree Channel route. The same winds create a favorable following ocean current for vessels whose owners choose the southerly route, therefore making the southerly route shorter in time. Accordingly, navigational publications issued by both the British and United States governments recommend that vessels proceeding from Ceylon to Durban in May chart a course south of the Maldivian Islands.

At noon on the 13th the boatswain, Alexapoulos, took over the watch and the master obtained the ship's position by means of celestial navigation. The vessel's course was then altered to 230°T. However, the master did not place this new course line on the ship's chart (Opinion 86a). Captain Maiden, the ship owner's expert witness, considered it good practice for a navigator to lay off the ship's course on the chart being used to navigate the vessel (252a). The master's error in failing to do so occurred while Alexapoulos had the watch, and Alexapoulos, the boatswain, would not and because of his own navigational

deficiencies was in no position to question the master's navigation (231a).

At noon May 14th, again during Alexapoulos' watch, the captain of the "Nicolaos S. Embiricos" obtained the ship's position by means of celestial navigation. The noon position was plotted on the chart. This position is approximately 3½ miles north of the 228°T. course line which was on the chart, but fourteen miles southeasterly of the 230°T. course which the vessel had actually been steering since noon of the previous day. Captain Koutsoukos forgot that he had changed course to 230° noon May 13th, and came to the erroneous conclusion that the current had set the vessel to the north (153a-154a) when in fact it had been set some fourteen miles to the southeast (252a). Captain Maiden testified as follows:

> "Would you consider that his error in this regard should have been fairly obvious to any competent navigator? A. Yes." (252a)

The error wasn't obvious to either Captain Koutsoukos or boatswain Alexapoulos.

At noon on the 14th, while Alexapoulos had the watch, the course of the "Nicolaos S. Embiricos" was changed to 233°T. Captain Koutsoukos believed that this course would safely take the vessel through One and One Half Degree Channel.

Captain Maiden testified as follows:

> "* * * Would you as a competent navigator ever attempt to go through One and One Half Degree Channel from the noon position of May 14th on such a course? A. No.
>
> Q. Thank you. Why? A. Because of the easterly set of the current which I would expect.
>
> Q. And a course of 233°, given the set and drift of the current, would place you too close to Suvadiva Atoll for safe navigation would it not? A. It would." (253a)

The vessel's radar had been shut off shortly after departure from the port of Colombo, Ceylon and was not turned on thereafter. The master testified that he did not use the radar because, in his opinion, the Maldive Islands were so low lying that they would not be able to be detected by the ship's radar (149a).

On May 15, at 1:22 A.M., again while Alexapoulos had the watch (139a), the vessel went hard aground on the coral reef off Maldive Atoll. After the vessel was aground the radar was turned on, and the reefs and islands forming Suvadiva Atoll were observed on the radarscope at a distance of 13½ to 15 miles (322a).

Introduction to Argument

The provisions of the United States Carriage of Goods by Sea Act [46 U.S.C.A. § 1300-1315] govern these contracts of carriage.

Section 1303 of the Carriage of Goods by Sea Act provides in part:

> "1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to
>
> (a) Make the vessel seaworthy;
>
> (b) Properly man, equip and supply the ship;"

Section 1304(1) of the Act provides in part:

> "Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of *due diligence* shall be on the carrier or other persons claiming exemption under this section."

Section 1304 of the Act provides in part:

> "2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the management or in the navigation of the ship."

Cargo claimants have made out a *prima facie* case by proof of delivery of the cargo and failure by the carrier to redeliver the cargo or redelivery of the cargo in a damaged condition or encumbered by liens.

In *Lekas & Drivas, Inc.* v. *Goulandris,* 306 F.2d 426, 429 [CA 2d 1962], the Court said:

" . . . a shipper makes out a prima facie case by proving that his goods were delivered to the carrier in good condition and were outturned damaged or not at all; the burden then falls upon the carrier to bring itself within an excepted cause or to prove it exercised due diligence to avoid and prevent the harm."

After the claimant makes out a *prima facie* case the burden falls on the carrier to bring itself within a *specific* exception. *General Foods Corp.* v. *The Troubador,* (S.D.N.Y.) 98 F. Supp. 207, 209; *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.,* 32 F. Supp. 520, 529; *American Tobacco Co.* v. *The Katingo Hadjipatera* (S.D.N.Y.), 81 F. Supp. 438, 445, aff'd 194 F.2d 449, cert. den. 343 U.S. 978. The rule that the carrier must *explain* the loss and bring it within a *specific* exception is fair and logical. The carrier is the party who is in a position to know what happened during the voyage.

A carrier's obligation to make the vessel seaworthy is strictly construed. In the case of *Compania General De Tabacos De Filipinas* v. *United States,* 49 F.2d 700 [CA 2d 1931], the Court said:

"When the owner accepts cargo in an unseaworthy ship, though the defect be such as may be neutralized by care, he imposes on the shipper an added risk; not merely that his servants may fail, insofar as she is

> sound and fit, but that they may neglect those added precautions which her condition demands. That risk the statute does not impose upon the shipper; he bears no loss until the owner has done his best to remove all risk except those inevitable upon the seas."

A carrier cannot escape liability for negligent navigation if, as in this case, its failure to exercise due diligence to make the vessel seaworthy caused or *contributed* to the loss.

In the case of *Union Carbide and Carbon Corp.* v. *The Walter Raleigh, et al.*, 109 F. Supp. 781 (S.D.N.Y. 1951), aff'd 200 F2d 908, the District Court said at page 793:

> "The carrier has the burden of showing that the loss was due to one of the excepted causes. Further, the carrier has the burden to show that it used due diligence to make the vessel seaworthy for the voyage. American Tobacco Co. v. The Katingo Hadjipatera, D.C. 81 F. Supp. 438. If it appears that there may have been several concurring causes of the damage, the burden is on the carrier to show that it was due to one of the causes excepted under the Carriage of Goods by Sea Act. And if it is shown that more than one cause was an effective and proximate cause of the damage and that one of the causes was the unseaworthiness of the vessel, the fact that the other cause was an excepted cause under the Act does not relieve the carrier from liability. If unseaworthiness resulting from the carrier's failure to exercise due diligence to make the vessel seaworthy concurs with negligent management of the vessel by the officers, the carrier is liable."

In the case herein the unseaworthy condition of the ship, brought about by the failure of its owner to provide a full complement of licensed deck officers; by its failure to man the ship with competent personnel; and by its failure to supply the ship with up-to-date governmental publications, contributed to the stranding and resulting loss.

POINT I.

The District Court erred as a matter of law in holding that Compania Naviera Epsilon, S.A. made "substantial efforts" to find a licensed officer to replace the temporarily employed boatswain who was acting in the capacity of a licensed officer for more than a year prior to the stranding and who had the watch when the vessel went aground.

Alexapoulos, the boatswain who was acting in the capacity of a licensed second officer and who was on watch when the vessel stranded, was hired in March, 1968 and signed on board the "Nicolaos S. Embiricos" at the port of Ravenna, Italy in April, 1968. The ship's articles, which specified that the boatswain was acting in the capacity of a licensed second officer, were approved by the local Greek governmental representative in Rotterdam in October, 1968. The vessel stranded on May 15, 1969.

The District Court said:

> "The court finds that given the approval of the Greek official in Rotterdam, and the *substantial efforts* by Andronikis [the vessel's general manager] to find licensed seamen, cargo claimants have failed to satisfy their burden of proving that qualified seamen were available to serve as second mates at the appropriate rates *in 1968.*" (emphasis added) (Opinion, 102a)

The above quote is a *non sequitur* in that it fails to take into account the time which elapsed from January 1, 1969 to May 15, 1969, during which period the boatswain continued to act in the capacity of a licensed officer.

It is also erroneous as a matter of law in that cargo claimants do not have the burden of proving the availability of licensed officers. It is the vessel owner who is seeking to escape the onus of his failure to man his ship with duly

licensed personnel who has the burden of proving that such licensed personnel were unavailable.

Mr. Andronikis, who was the owner's representative in charge of manning the "Nicolaos S. Embiricos", testified that he received a request from the company's London Office to hire two licensed second mates to serve on board that vessel in March of 1968. He said:

> "We sought to find the wanted parties with proper licenses but, as you know, for us Greek Orthodox the Easter Holidays are of great importance and it was not feasible to find licensed officers at this point." (263a)

The testimony given by Mr. Andronikis should be treated circumspectly. Easter in the Greek Orthodox Church is celebrated on the first Sunday following the first full moon of the vernal equinox. In the year 1968 the Greek Orthodox Church celebrated Easter on April 21 and for forty days thereafter.

Alexapoulos, the boatswain, was the first of the two men to be hired to act in the capacity of licensed officers, but he was not given the wage of a licensed officer. A duly licensed second mate was later hired, also during the month of March, 1968 (263a-264a).

There is no testimony in the entire record that from the time the boatswain was hired to act as a licensed second mate in March of 1968 until the vessel stranded in May of 1969 the vessel owner made any effort whatsoever to replace the boatswain with a licensed second officer.

The District Court further said:

> "Kypriotes [the Greek official in Rotterdam] testified that he was familiar with the supply of second mates in Rotterdam and Holland during 1968 and that no such seamen were available when Alexapoulous [the boat-

> swain] was approved. Cargo claimants sought to disprove this testimony by offering a record obtained from the Maritime Employment Agency in Greece which attests to a list of unemployed second mates *during January-April 1968.*" (emphasis added) (Opinion, 101a)

The District Court was wrong. The Maritime Employment Agency, a branch of the government of the Kingdom of Greece, attested that there were licensed mates available from *January 1 through May of 1969.* This testimony was uncontradicted. The error was called to the attention of the District Court and the Opinion was modified to reflect the correct dates (114a, 115a).

The Maritime Employment Agency further attested that no one from the office of the owner or operator of the "Nicolaos S. Embiricos" ever applied to the Maritime Employment Agency of the Kingdom of Greece seeking a licensed second mate from January 1, 1969 through May 15, 1969.

In the year 1968 S.G. Embiricos Limited operated the "Nicolaos S. Embiricos" and approximately 29 other vessels, including those hereinafter mentioned. In October of 1968 the Greek flag vessel "Metamofosis" was sold. In December of 1968 the Panamanian flag vessel "Azuero" grounded and became a total loss. In January of 1969 the Panamanian flag vessel "Anastassia" grounded and became a total loss. In January or February of 1969 the Greek flag vessel "Crete" was sold for scrap. In April of 1969 the Greek flag vessel "Eleni S" was sold (259a-261a). Immediately prior to the sale or groundings of the foregoing vessels they should have been manned by licensed officers. Therefore, there were qualified officers even within the Embiricos fleet who could have replaced the unlicensed boatswain, Mr. Alexapoulos, prior to May 15, 1969.

The District Court erred in concluding that the vessel owner had made "substantial efforts" to hire a licensed second officer. The District Court further erred in holding that cargo claimants had the "burden of proving that qualified seamen [officers] were available." However, with respect to the burden of proof, cargo claimants aver that even if they had such a burden it was established that licensed second officers were available.

POINT II

Compania Naviera Epsilon, S.A. is at fault for failing to man the M/S "Nicolaos S. Embiricos" in accordance with the Laws and Regulations of the Kingdom of Greece and because of its failure in this regard has the burden of proving that its fault not only did not but could not have been a contributing cause of the resulting stranding and damage.

The District Court said:

> "It is not disputed that the second mate Alexapoulos did not possess a ticket which licensed him to serve as a second mate aboard the vessel." (Opinion, 99a, 100a)

The basic laws of the Kingdom of Greece which were in effect during the years 1968-1969 provided that a vessel of the size of the "Nicholaos S. Embiricos" must be manned with a deck officer complement consisting of one licensed captain, one licensed chief mate and two licensed second mates (176a).

Section 4 of the basic Greek law provides that a vessel owner, with the permission of the Greek Shipping Commission, may "temporarily" fill existing vacancies in his crew complement with "Greek seamen not possessing the statutory qualifications" (267a, 268a).

Section 5 of the basic Greek law provides:

> "Those signed on under the provisions of Section 4 shall remain on board only so long as the condition

precedent that it is impossible to sign on duly qualified Greek seamen set forth in paragraph 2, Section 4, manifestly continue to obtain." (268a)

Some time prior to 1958 the Government of Greece was desirous of obtaining an infusion of foreign capital. In furtherance of that policy the Government issued Instruments of Approval for specific vessels whose owners desired to register their ships under the Greek flag. The owners of vessels who obtained such Instruments of Approval received tax and other advantages. Such an Instrument of Approval was granted to Compania Naviera Epsilon, S.A., as owner of the "Nicolaos S. Embiricos". The pertinent section of the Instrument of Approval granted for Compania Naviera Epsilon provides:

"With respect to the entire crew and regardless of capacity, the use of Greek seamen not possessing the qualifications prescribed by law or even foreign seamen shall be permitted in instances where it is *manifestly difficult* to find suitable and competent Greek seamen readily or in instances where terms other than those prescribed by the laws of Greece, particularly, terms relative to the wage scale, are being demanded by Greek Seamen." (Ex. 9, clause 8, 307a-308a)

For the purpose of clarity it may be helpful to point out that the Instrument of Approval, as well as the basic Greek law, refer to all crew members as seamen. The officers (a boatswain is not an officer) are referred to as licensed seamen. All other members of the crew are unlicensed seamen.

The District Court found, and it is not disputed, that if there is an inconsistency between the basic Greek law and the Instrument of Approval the terms of the Instrument govern.

Spyros Nicolaidis, cargo claimant's expert on Greek law, testified that in this particular case there was no incon-

sistency between the basic Greek law and the Instrument of Approval, and further stated the obvious, that under either, the vessel owner had an obligation to replace temporarily employed unlicensed personnel with licensed officers as soon as the latter became available (269a). The District Court did not disagree with this interpretation.

The District Court found as a matter of fact that (1) licensed second officers were not available during the 1968 Greek Easter Holiday (102a) and (2) licensed second officers were not available in Holland in October of 1968 (101a). The Court then concluded as a matter of law that the owners of the "M/S Nicolaos S. Embiricos" had complied with the Greek manning requirements by permitting the boatswain to continue to act in the capacity of a licensed second mate from April 1968 through May 1969.

The legal conclusion does not follow from the factual premise.

In holding that the owners of the "Nicolaos S. Embiricos" complied with the Greek manning requirements the District Court must have, and in fact did overlook the uncontroverted evidence from the Maritime Employment Agency of Greece that there were licensed second officers available from January 1, 1969 through May 15, 1969. The Court further refused to take into account the evidence given by Embiricos' London manager that during the period from October 1968 through May 15, 1969 five vessels operated by that company were sold or were lost due to groundings and, accordingly, there should have been licensed officers available within its own fleet with which to properly man the "Nicolaos S. Embiricos."

We submit that the District Court was wrong in failing to conclude that the owners of the "Nicolaos S. Embiricos" did not comply with the manning requirements of the Greek government by permitting the temporarily employed unlicensed boatswain to permanently act in the capacity

of a licensed second mate when the evidence is conclusive that there were licensed second officers available.

Should this Court agree that the owner of the "Nicolaos S. Embiricos" violated the Greek manning requirements when that vessel stranded, then it follows that the vessel owner has the burden of establishing that his fault in this respect not only did not but could not have been a contributing cause of the stranding and resulting cargo damage and loss.

In the case of *The Denali,* 105 F.2d 413 [CA 9th 1939], the Court said, at page 418:

> "[8] The vessel was wrecked by the fault of navigation of the substitute mate Obert, who was 'assisted' by the third mate, who acted under Obert's orders. Since both men were serving under a watch system used in violation of the statute, the burden falls on the Denali's owner of showing not merely that the two watch system probably did not but that it *could not* have contributed to the stranding."
>
> "As this court, in reviewing and summarizing the cases, has said concerning this extraordinary burden of proof on violators of statutes governing vessels and their navigation and management, 'Failure to obey a statute does, indeed, penalize the violator. The penalty, however, is not that the violator is to be held accountable for any mishap, regardless of its relation to the violation. The rule simply is that the violator is penalized with the burden of showing that the violation not only probably did not cause the accident, but that it could not have done so. *This burden it is frequently extremely difficult, if not impossible, for the violator to discharge, in the nature of things; and therein lies the true penalty imposed upon him.*' (Emphasis supplied.) The Princess Sophia, 9 Cir. 61 F.2d 339, 347."

This is a burden which plaintiff has not and furthermore, on the facts of this case, cannot sustain. The unlicensed

acting second mate had the watch at the time the master failed to place on the chart the new course of 230°T., had the watch when the master made the obvious error of believing that his vessel was being set by the current to the north rather than to the south, had the watch when the master set the improper course of 233°T. in order to proceed through One and One Half Degree Channel, and had the watch when the vessel went aground.

POINT III

Compania Naviera Epsilon, S.A., as owner of the M/S "Nicolaos S. Embiricos", is at fault for manning its vessel not only with unlicensed but with incompetent personnel.

In the case of *The Framlington Court*, 69 F.2d 300 [CA 5th 1934], at page 304 the Court said:

> "[15-17] Seaworthiness is a relative term depending for its application upon the type of vessel and the character of the voyage. The general rule is that the ship must be staunch and strong and well equipped for the intended voyage. And she must also be provided with a crew, adequate in number and competent for the voyage with reference to its length and other particulars, and have a competent and skillful master of sound judgment and discretion."

If a vessel owner signs on board unlicensed personnel to perform the duties which should be carried out by a duly licensed officer he has an added obligation to the owners of the cargo which his ship is carrying to make certain that such unlicensed personnel are competent. In its opinion in the case herein the District Court said:

> "Cargo claimants maintain * * * that he (the unlicensed boatswain) was in fact incompetent in not ascertaining Koutsoukos's (the ship's master) errors

and questioning the latter's navigation techniques." (Opinion 88a)

Cargo claimants maintained in the court below and now again contend that the boatswain was incompetent to perform the duties of a licensed second officer. The District Court never answered cargo claimants' contention in this regard, and never made a finding regarding the boatswain's incompetence.

The only expert witness who testified on issues of navigation and the duties of a licensed deck officer was Captain Percival E. Maiden. He was called to testify by counsel for Compania Naviera Epsilon, S.A., the vessel owner. The District Court in its opinion refers to Captain Maiden as cargo claimants' expert witness (Opinion 96a). This error was also called to the attention of the District Court and the opinion was modified accordingly by the District Court (112a-113a).

On cross-examination Captain Maiden testified:

(1) A mate standing watch at sea has the responsibility of looking after the safe navigation of the vessel. He is solely responsible for what happens to the vessel while it is his watch (245a).

(2) A mate must be a capable navigator (245a). He should be able to determine the actual course and speed of a vessel over the ground, given the set and drift of an ocean current (246a-247a). This is basic navigation (250a).

(3) He should be able to use the ship's radar as an anti-collision device (245a).

(4) He should be freely permitted to turn on and use the ship's radar and other navigational aids (245a).

(5) He should be completely familiar with the International Rules of the Road (245a).

(6) Any competent mate should question the master's navigation if, in his judgment, the master erred (245a-246a).

Captain Maiden further testified on cross-examination that Alexapoulos, the boatswain (248a-250a), was not a capable navigator; that he did not have a good knowledge of the International Rules of the Road (255a), and that he was unable to use radar as an anti-collision device (255a).

In short, Captain Maiden averred that Alexapoulos was incapable of performing the duties of a licensed second officer.

The boatswain, Alexapoulos, testified that he would never question the master's navigation, and that he was not permitted by the master to use the vessel's radar unless he obtained specific permission from the captain.

The uncontradicted testimony establishes that the boatswain was not only unlicensed but incompetent.

The District Court opines that it didn't make any difference whether the boatswain was licensed or unlicensed, competent or incompetent. The District Court said:

> "The claim of proximate causation rests upon the contention that a properly qualified second mate would have corrected the Master's navigation errors, and would have operated the ship's radar during the watch when the stranding occurred. *The court rejects these speculations.* We note that Marinatos was a licensed second mate, but he did not (as most subordinates would not) question the Captain's navigation calculations, despite the fact that he was given the last course correction before the vessel took the strand." (Opinion 105a)

The vessel owner's own expert witness testified that a competent mate should be an able navigator, and a competent mate should inform the master whenever the master committed a navigational error. This is not "speculation".

This is uncontradicted testimony; this is common sense. If a master's orders, even though palpably erroneous, are to be blindly followed by the mate on watch why have a

requirement making it mandatory for a vessel to be manned by a licensed captain and three licensed deck officers? The District Court notes that the licensed second mate did not question the captain's navigation but fails to note that the master's navigational error did not occur while the licensed second mate was on watch. Furthermore, the logic of the District Court's argument eludes us. The issue is: Should a capable deck officer question the master's navigation when he has reason to believe the master erred? This issue cannot be resolved by noting what some other officer did or did not do under different circumstances.

POINT IV

The District Court applied improper legal standards in concluding that the master of the M/S "Nicolaos S. Embiricos" was competent.

The District Court said:

> "The court has found, as already noted, that Koutsoukos (the master) in fact committed serious errors during the voyage in question. However, the court is not convinced that his conduct reflected such a condition of incompetence as to have made the vessel unseaworthy." (Opinion 97a)

Perhaps the Court so held because it was under the erroneous impression that cargo claimants relied in part on "their expert witness Captain Maiden" to establish the master's incompetence.

Nowhere in the District Court's opinion is there any reference to or hint of the standards which it used in concluding that the master was, in fact, competent. The Court does not refer to cases, statutes or testimony in support of its finding. We submit that there is an apparent lack of understanding on the part of the District

Court of the qualifications required by law of the master, and, for that matter, the deck officers of a vessel.

A competent master should be able to perform basic navigational problems such as determining the vessel's course and speed when the ship is proceeding in an ocean current. Captain Koutsoukos couldn't (250a-251a). A competent master should be able to determine from the pilot charts which were aboard the vessel the set and drift of the current which the ship would encounter on its voyage from Colombo, Ceylon through One and One Half Degree Channel (251a-252a). The District Court so held (Opinion 91a). Captain Koutsoukos testified that the pilot charts which were aboard the "Nicolaos S. Embiricos" did not indicate to him the set and drift of the ocean current between Ceylon and One and One Half Degree Channel (147a-148a).

Captain Maiden testified that it was "common knowledge" that ocean currents in the area of One and One Half Degree Channel set to the east during the monsoon season which was in effect in May (245a). Captain Koutsoukos didn't know it (146a).

The District Court specifically found that Captain Koutsoukos' failure to take into account the set and drift of the current was a contributing cause of the stranding (Opinion 89a).

A capable master should be able to select the safe and recommended course that a vessel should take en route to its destination. Captain Koutsoukos selected not the recommended but rather a dangerous route, a disapproved route. The District Court so held (Opinion 89a).

A capable master should have used the ship's radar when attempting to proceed through One and One Half Degree Channel. The District Court so held. Captain Koutsoukos didn't use the radar (Opinion 89a, 90a).

Captain Koutsoukos had been employed by Compania Naviera Epsilon as a master for ten years. He had stranded the "Nicolaos S. Embiricos" on two prior occasions (135a-136a). His deficiencies as a master were or should have been known to the vessel owner. In view of the profligacy of the errors which the District Court found to have been committed by the master of the "Nicolaos S. Embiricos" one wonders what standards the District Court was using when it found that the master was a competent officer.

In the case of *Propeller Niagara* v. *Cordes, et al.*, 62 U.S. 7 (1858), the Supreme Court said at page 23:

> "A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and stanch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place, temporarily, at least, in case of his sickness or physical disqualification."

In *Peninsular & Occidental S.S. Co.* v. *National Labor Relations Board*, 98 F.2d 411 [CA 5th 1938], the Court said at page 414:

> "The owners of vessels, their masters and other officers, are required to exercise the highest degree of care and skill for the preservation of the lives of passengers and crews and to safely transport the cargo. This duty is superior to all other considerations in the operation of ships."

In the case of *In Re Pacific Mail S.S. Co.,* 130 Fed. 76 [CA 9th 1904], the Court said at page 82:

> "It is, as was said by Judge Hawley in Re Meyer (D.C.) 74 Fed. 885, 'the duty of the owners of a steamer carrying goods and passengers, not only to provide a seaworthy vessel, but they must also provide the vessel with a crew adequate in number, and competent for their duty with reference to all the exigencies of the intended route'; not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, such, for example, as unfortunately did happen in the present case—the striking of the ship on a reef or rocks—"

In this era, when the stranding of one supertanker could contaminate the shoreline of an entire country, where esoteric cargoes let loose could cause incalculable damage to the health and environment of a large segment of our population, our courts should take the lead in demanding that vessels be manned by highly qualified personnel. The opinion of the District Court dilutes the standards of competency set by the Supreme Court of the United States as far back as 1858, and gives license to vessel owners to make a profit from operating inadequately and incompetently manned ships to the peril not only of the cargo which they are carrying but to the general public. One wonders whether if this had been more than merely another commercial case, if lives had been lost, shorelines contaminated, the District Court would have reached the same conclusion.

POINT V

Compania Naviera Epsilon, S.A. is at fault for failing to provide its vessel with the latest governmental navigational publications which contained pertinent information relative to the safe passage of a ship through One and One Half Degree Channel.

The owner of the "Nicolaos S. Embiricos" furnished its ship with British charts and British governmental nautical publications, including the West Coast of India Pilot, 1950 edition, with the 1957 supplement. The master of the "Nicolaos S. Embiricos" avidly read the 1950 edition of the West Coast of India Pilot prior to and during the voyage from Colombo, Ceylon toward One and One Half Degree Channel (144a, 149a). Captain Koutsoukos was so imbued with the importance of the navigational data contained in this publication, considered the information so valuable that he was able to recall when he testified approximately one year after the grounding that it was contrary to Maldivian law to give gifts to Maldivian natives (163a).

The District Court found that the vessel owner had neglected to furnish the "Nicolaos S. Embiricos" with the 1961 edition of the West Coast of India Pilot prior to the commencement of the voyage which ended on the coral reefs of Suvadiva Atoll. The District Court found that the 1961 edition was available prior to the commencement of the voyage and that *only* the 1961 edition contained information which advised navigators that the atolls forming the Maldivian Islands could be detected by radar at a range of about 20 miles and that the arrangement of the individual islands could be noted at a distance of 15 miles (Opinion 91a-92a). The master of the "Nicolaos S. Embiricos" lacked this pertinent information.

On the eastward voyage of the "Nicolaos S. Embiricos", i.e. the voyage from Lorenco Marquis to Colombo,

Ceylon the ship passed through One and One Half Degree Channel and the master did not observe the Maldivian atolls on the ship's radar (148a). The master erroneously concluded that the atolls were too low lying to afford radar targets and for this reason did not turn on the ship's radar when approaching One and One Half Degree Channel on the westward voyage (149a).

One and One Half Degree Channel is 54 miles wide and if the ship on the eastbound voyage was proceeding in the center of the channel, as it should have been, the radar would not have detected the atolls.

We submit that had the 1961 edition been on board the ship Captain Koutsoukos would have been apprised of the information contained therein relative to radar navigation through One and One Half Degree Channel, would have known that the atolls should be visible on the ship's radar at a distance of 20 miles, and would have used radar as a navigational aid during his approach to the entrance of the channel on the westbound passage, for it is the danger of stranding which any capable master must avoid.

The District Court found that the ship's radar was in good operating condition, that the radar was not used by the ship's navigating personnel, and that the failure to use the radar was "an error which proximately caused the stranding".

The carrier has an obligation to cargo to make certain that his vessel, prior to departure, is equipped with up-to-date nautical publications.

In *The Maria* (*Gladioli* v. *Standard Export Lumber Co. Inc.*), 91 F.2d 819 [CA 4th 1937], the Court said, at page 824:

> "Our view of the law, now that the point has been definitely raised, is that charts, light lists, and similar navigational data are essential equipment for the safe

navigation of a ship, that she is unseaworthy without them, and that it is the duty of her owner to supply them. Such documents of course become sources of information for the navigator, and the task of securing them is often delegated to officers of the ship. Failure to supply adequate information or navigation without it may thus constitute negligent navigation or management for which they are chargeable; but it does not follow that the owner is thereby relieved by the Harter Act from liability from ensuing disaster, because the same circumstances may also amount to failure on his part to use due diligence to make his vessel seaworthy. The duty of an owner in this respect is nondelegable; and the navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transform unseaworthiness into bad seamanship."

In *Atlantic Mutual Insurance Company, et al.* v. *Consulich Societa Triestina Di Navigazione,* 15 F. Supp. 745 (S.D.N.Y. 1936), the Court said, at page 751:

"The United States government is at great pains and spares no expense, as is undoubtedly true with respect to the Italian government, to chart channels, post warnings of dangers to navigators, and keep up to date, and available for use, charts and other information at comparatively little or no expense. It is necessarily a part of the policy of insuring safety at sea in these enlightened times of modern inventions, and the maintenance of that policy requires the use of every reasonable effort to avoid or minimize danger on the high seas.

For these reasons, shipowners should be held to as strict accountability as modern facilities enable them, with reasonable diligence, to provide."

See also *Weyerhauser Timber Co. et al.* v. *Continental S.S. Co. et al.,* 94 F.2d 834 [CA 2d 1938].

The carrier's obligation to use due diligence to provide up-to-date nautical publications for the "Nicolaos S. Embiricos" is non-delegable. *The Esso Providence,* 112 F. Supp. 630 (S.D.N.Y. 1953); *Ore S.S. Co.* v. *Hassel,* 137 F.2d 326 [CA 2d 1943].

The importance of keeping the vessel supplied with up-to-date nautical publications was stressed by Captain Maiden the ship owner's expert witness when he testified that his company made it a practice to send new editions of charts and nautical publications to its vessels via Air Mail every three months (239a).

The District Court specifically found that: "the channel passage (through One and One Half Degree Channel) featured uncertain currents during months other than April and October. Such currents made the voyage dangerous, as the unhappy fate of the 'Embiricos' illustrated". Indeed, the West Coast of India Pilot warns navigators not to proceed through the channel at night (163a).

We reiterate that the District Court found that the ship's master was at fault for not using the ship's radar and that his failure in this regard was a proximate cause of the stranding. The evidence further established that following the stranding the radar was turned on and the islets of Suvadiva Atoll were seen on the radarscope at a distance of 13-15 miles.

The District Court found that the intended course of the "Nicolaos S. Embiricos" as laid off on the chart by the ship's master would have taken the vessel 16 miles north of Suvadiva Atoll or well within radar range according to the information contained in the 1961 edition of the West Coast of India Pilot.

Nevertheless, the District Court exonerated Compania Naviera Epsilon, S.A. for its failure to supply its vessel with the 1961 edition of the West Coast of India Pilot

stating:

> "Nor is it more than remote speculation that the Pilot's (West Coast of India Pilot 1961 edition) information would have induced Koutsoukos to turn the radar on" (Opinion 92a).

We submit that in view of the facts hereinbefore set forth one does not have to speculate as to what a competent navigator would have done had he known radar could be used as a navigational aid in proceeding through One and One Half Degree Channel. The answer is clear. It would have been used.

The District Court is inconsistent. Either the master was incompetent and the vessel owner is therefore at fault for failing to furnish cargo with a seaworthy ship, or the vessel owner's failure to furnish its vessel with the latest governmental publications rendered the ship unseaworthy. The District Court can not have it both ways.

POINT VI

The District Court erred in exonerating Compania Naviera Epsilon, S.A. after specifically holding that a "basic error" which caused and contributed to the stranding of the "Nicolaos S. Embiricos" was the improper selection of the route which the vessel would follow to her destination.

The District Court said:

> "Navigation guides available on the 'Embiricos' showed that the recommended and safe course at that time of year lay south of the Maldives rather than through the channel. The channel passage featured uncertain currents during months other than April and October. Such currents made the journey dangerous as the unhappy fate of the 'Embiricos' illustrated." (Opinion 89a)

The Court held that the improper selection of the route was a "basic error" which contributed to the stranding.

We submit that the Court erred in exonerating the vessel owner for its fault in this regard in that negligence in the choice of routes made prior to the inception of the voyage is not an error in navigation within the meaning of the exculpatory provisions of the Carriage of Goods by Sea Act.

Section 1304 of the Carriage of Goods by Sea Act provides in part:

> "Neither the Carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the Carrier in the management or in the navigation of the ship."

The Carriage of Goods by Sea Act is in derogation of the common law and therefore should be strictly construed. The rationale behind the Act and its predecessor, The Harter Act, was that if a vessel owner exercises due diligence to furnish a seaworthy vessel prior to the inception of the voyage, and seaworthiness contemplates that the vessel will be manned by duly licensed competent personnel, then the ship owner should be exonerated from the occasional negligent conduct of such personnel which is beyond the owner's control in negligent acts which occur after the commencement of the voyage.

In the case of *The Wildcroft,* 201 U.S. 378, 1906, the Supreme Court, in interpreting the similar provision of The Harter Act, said at page 389:

> "The whole matter is in the control of the owner. The law says, in substance, that when the owner can show that he has discharged this duty he shall be relieved from errors of navigation and management on the voyage, over which he has not such direct control."

The Court restricts the exculpatory provision of the Act to those errors made "on the voyage", that is to say, after the voyage began.

The selection of a proper route is made before the commencement of the voyage. This decision is within the control of the vessel owner.

The "American Practical Navigator", originally published in 1802 by Nathaniel Bowditch has been the bible of navigators for over 100 years. It has been reprinted and kept up-to-date by the United States Oceanographic Office, under the Secretary of the Navy, pursuant to authorization by an Act of Congress (R.S. 432). There could be no better authority on the meaning of the word "navigation" intended by Congress than that given in this book. "Navigation" according to Bowditch is:

> "That science generally termed navigation, which affords the knowledge necessary to conduct a ship from point to point upon the earth, enabling the mariner to determine, with a sufficient degree of accuracy, the position of the vessel at any time, * * *"

In the case of *Trustees, etc. of the Town of Brookhaven* v. *Smith,* 90 N.Y.S. 646 (N.Y. App. Div. 1904), the Court said:

> "Navigation is defined by Bouvier (2 Bouv. Law Dict. [2nd Ed.] 196) as 'whatever relates to traversing the sea in ships, the art of ascertaining the geographical position of a ship, and directing its course'. While the American and English Encyclopedia of Law (2d Ed. vol. 21, p. 445) declares that 'to navigate means to steer, direct or manage a vessel and implies that the act is done by those on board of the vessel itself."

We submit that the definition of the word "navigation" and the word as it is used within Section 1304 of the Car-

riage of Goods by Sea Act does not encompass a choice of routes made before the vessel left port.

In the English case of *S.S. Lord* (*Owners*) v. *Newsum, Sons and Company Limited,* 1920 K.B., Vol. 1, page 846, the High Court of Justice had before it the issue of whether the error of a master in selecting a dangerous and improper route prior to the departure of the voyage exonerated the vessel owner for damage to cargo which was being carried under a charter party which exculpated the carrier from liability for loss or damage caused by "negligence, default or error of judgment of the pilot, master, or crew, or other servants of the owners in the management or navigation of the steamer". The Court resolved the issue against the vessel owner, stating:

> "No one would say that what the master did was done by him in the 'management' of the ship, but the question remains, was it something done in the 'navigation' of the ship? Some light is thrown upon the meaning of the term 'navigation' as there used by having regard to the other persons named in addition to the master, namely the pilot, and crew. In my opinion the word 'navigation' as used in cl. 14 refers to a ship which is in motion, a ship which is being navigated. The pilot can hardly make an error in navigation and indeed would not as a rule be employed, save when the ship is in motion or is being cast off. The word 'management' may well be applied to a ship while she is in harbour and also while she is in motion, and the two words taken together denote something done in the user or control of the ship while in harbour or on her voyage. Things done of that nature come within the terms 'navigation or management,' but the deliberate choice, while in harbour, of one of two routes to be pursued cannot, I think, be an error in the 'management' or in the 'navigation' of the ship. There is no doubt sometimes great difficulty in drawing the line between what is and what is not 'navigation,' but

> I think the line ought to be drawn in the way I have indicated and as excluding the deliberation by the master in port regarding the route by which he will proceed to his port of destination."

In the case of *C. Wilk Svenssons Travaruaktiebolag* v. *Cliffe Steamship Company,* 1932 K.B., Vol. 1, p. 490, the High Court of Justice, in construing the term "navigation" said:

> "The word 'navigation' in this connection [Charter party clause 'accidents of navigation'] ought to be limited to matters done in the handling of the ship in what is naturally called navigation, that is to say, when she is under way." (p. 500)

POINT VII

The voyage was frustrated as a result of the ship owner's failure to exercise due diligence to furnish cargo interests with a seaworthy vessel, therefore, Thos. & Jno. Brocklebank Ltd. are not entitled to recover freight monies.

The bills of lading issued by Thos. & Jno. Brocklebank to the shippers of cargoes laden on board the "Nicolaos S. Embiricos" did contain an earned freight clause. Such a provision is enforceable under circumstances where the voyage had to be abandoned by impossibility of performance which was without the control of the vessel owner, its servants, agents and employees. Thus, the Supreme Court in the cases of *Allanwilde Transport Corp.* v. *Vacuum Oil Company,* 248 U.S. 377 (1919); *International Paper Company* v. *The Schooner Gracie D. Chambers,* 248 U.S. 387, and *Standard Varnish Works* v. *The Bris,* 248 U.S. 392, concluded that a vessel owner, whose bill of lading contained an earned freight clause, was entitled to freight under circumstances where the voyage was interrupted as a result of governmental regulations stemming from World War I.

However, in the case of *The Louise,* 58 F. Supp. 445 (D.C. Md. 1945), the court held that a ship owner was not entitled to freight monies when the voyage was frustrated due to the owner's failure to exercise due diligence to make the vessel seaworthy prior to the inception of the voyage, even though the contract of carriage contained an earned freight clause. The Court said, at page 450:

> "The 'Louise' was flagrantly unseaworthy for her original voyage. Any reasonably careful and prudent owner must have known this. To permit the shipowner to receive and retain the prepaid freight under the circumstances here would be tantamount to a fraud on the cargo owner. Under the facts of this case the return of the ship to Baltimore must be classed as a voluntary deviation; and the legally efficient cause of the breaking up of the voyage was her unseaworthiness and not the requisition of the vessel."

In the case of *Mediterranean Agency Inc.* v. *Rethymnis and Kulukundis Ltd.,* 185 F. Supp. 34 (S.D.N.Y. 1960), the court held that an earned freight clause in a bill of lading did not entitle the vessel owner to retain freight monies if the failure to perform the voyage was due to the owner's fault in failing to exercise due diligence to make his vessel seaworthy at the commencement of the voyage.

It has been proven in the case herein that due diligence had not been exercised to make the "Nicolaos S. Embiricos" seaworthy at the inception of the voyage and that the voyage was frustrated as a direct consequence of the ship's unseaworthiness. Accordingly, the time charterer, Thos & Jno. Brocklebank Ltd., is not entitled to recover freight.

Conclusion

Compania Naviera Epsilon, S.A., as owner of the "Nicolaos S. Embiricos", is at fault for the stranding and resulting cargo damage in that it failed to exercise due

diligence to make the vessel seaworthy at the inception of the voyage and the unseaworthiness of the vessel was a proximate cause of the stranding and resulting damage. The faults of Compania Naviera Epsilon, S.A. were within the privity and knowledge of its management personnel and accordingly it is not entitled to the benefits of the provisions of the United States Limitation of Vessel Owner's Liability Act.

Thos. & Jno. Brocklebank, the time charterers of the vessel, issued bills of lading for the master. Such bills of lading bind the vessel, the ship owner and the charterer. Accordingly the charterer is jointly and severally liable with the owner. *J. Gerber & Company Inc.* v. *S.S. Sabine Howaldt, et al.*, 310 F. Supp. 343 (S.D.N.Y. 1969), and *Mente & Co. Inc.* v. *Isthmian S.S. Co.*, 36 F. Supp. 278 (S.D.N.Y. 1940), aff'd 122 F.2d 266 [CA 2d 1941].

Thos. & Jno. Brocklebank Ltd. has not petitioned for limitation of liability, nor as time charterer is it entitled to limit its liability. (46 USCA § 183 and 186, Gilmore and Black, The Law of Admiralty, 1957, page 673; *Petition of Skibs A/S Jolund*, 250 F.2d 777, 789 [CA 2d 1957], cert. den. 356 U.S. 933 (1958).

The voyage was frustrated as a result of owner's and charterer's failure to exercise due diligence to make the vessel seaworthy prior to the inception of the voyage. Accordingly, Thos. & Jno. Brocklebank is not entitled to freight monies.

The judgment of the District Court should be reversed.

Respectfully submitted,

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Due and timely service of TWO copies of the within BRIEF is hereby admitted this 17th day of JUNE 1974

Lord, Day & Lord
....
Attorneys for DEFENDANTS APPELLEES BROCKLEBANK, LTD, ET. AL.

Healy & Baillie
ATTORNEYS FOR APPELLANT EPSILON

FOR DAVID P. DAWSON
By [signature]
ATTORNEY FOR APPELLANT KELLAR INDUSTRIES